Supreme Court, U.S.
FILED
DEC 1 1999
CLERK

No. 98-1904

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, AND UNITED STATES DEPARTMENT OF STATE,

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS

CHARLES J. COOPER*
ANDREW G. MCBRIDE
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Pursuant to Rule 21.4 and this Court's directive, respondent hereby files his response and opposition to petitioners' motion to vacate the judgment below. Respondent does not oppose the portion of petitioners' motion seeking dismissal of the case as moot.

It is undisputed that both the court of appeals and the district court had live controversies before them when they addressed the merits of this action. After seeking this Court's review, petitioners *unilaterally* rendered this action moot by declassifying the letter at issue and providing it to respondent. Petitioners now wish to use mootness both as a shield and as a sword – preventing this Court from reaching the merits, while effectively delivering them the relief they seek by vacating the judgment of the court of appeals. Having deprived the Court of a live controversy, petitioners now take the extraordinary and unprecedented position that this Court should nonetheless adopt their view of the merits and vacate the judgment below for that reason. *See* Petitioners' Motion to Vacate the Judgment of the Court of Appeals and Remand the Case with Directions to Dismiss the Case as Moot at 19-24.[1]

This Court's unanimous decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), definitively precludes such a result. *Bonner Mall* rejected application of the "extraordinary remedy of vacatur," *id.* at 26, where a settlement entered into by the parties mooted the case pending this Court's review. It follows *a fortiori* that vacatur is wholly inappropriate where, as

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[1] In this response, citations are to the present motion ("Pet'r Mot."), Brief of the Respondent ("Resp. Br."), Brief for the Petitioners ("Pet'r Br."), Joint Appendix ("J.A."), Appendix to the Petition for Certiorari ("Pet. App."), Respondent's Brief in Opposition to Certiorari ("Opp. Cert.") and Reply Brief for the Petitioners in Support of Certiorari ("Reply Br.").

here, the party seeking review voluntarily moots the case through an action entirely within its own control. Petitioners propose a radical expansion of the dicta in *United States v. Munsingwear*, 340 U.S. 36 (1950), effectively allowing the government to wipe from the books precedents with which it disagrees without the inconvenience of adversarial litigation on the merits in a higher court. Such an approach is unfair to the lower courts, unfair to the litigant who prevailed in the court below, and allows frequent litigants in federal court, like the United States, to manipulate our civil justice system. Because the United States has voluntarily and unilaterally mooted its own petition for certiorari through an administrative action only it can take, the only appropriate remedy is simple dismissal of the writ.

STATEMENT

This Freedom of Information Act ("FOIA") case grew directly out of respondent's representation of Sally Ann Croft, one of two British nationals extradited to face criminal charges in Oregon in connection with their activities while members of the spiritual group led by the Bhagwan Shree Rajneesh. That extradition drew very open, very public dissent from many members of the British House of Lords and the British press. *See* Resp. Br. at 5-6; Pet'r Br. at 23 n.19. References were specifically and repeatedly made in public debates to concern over the extreme local prejudice in Oregon against former members of the Bhagwan's cult. The letter at issue in this case, a July 28, 1994 letter from the British Home Office to the Department of Justice ("Extradition Letter"), was sent contemporaneously with the delivery of Croft and Hagan to the United States. Respondent sought the Extradition Letter for the purpose of bringing British concerns (and any American promises) regarding local prejudice and change of venue to the attention of the district court presiding over the criminal case.

On November 29, 1994, respondent filed his FOIA request with the Department of State ("State"). In that request itself, respondent recited certain details regarding the Extradition Letter. These details had been conveyed to respondent two weeks earlier in a letter from Stephen Turner, H.M. Consul, Seattle, Washington, to Leslie Weatherhead (November 16, 1994) ("Consu[illegible]r Letter"), which respondent has now lodged with this Court. In his initial FOIA request, respondent wrote to State: "This will request a copy of a letter from the British home office to George Procter of the United States Department of Justice dated July 28, 1994, related to the *extradition and prosecution* of Sally Croft and Susan Hagan." J.A. 10 (emphasis added). Petitioners never disputed this characterization of the letter and, in fact, admitted it in their answer to respondent's complaint. *See* J.A. 38-39.

Similarly, petitioners' own affidavits before the district court acknowledged that the letter at issue contained expressions of British concerns over handling of the criminal case in the United States. Thus, the Shiels Declaration, filed in March 1996, states:

> The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K extradition agreement.

Pet. App. 54a.

Thus, petitioners were aware before this FOIA litigation commenced that respondent knew the date, addressee, and general subject matter of the letter at issue. Yet, petitioners never inquired of respondent or the British Government about how respondent learned these

details about a putatively confidential and classified letter.[2]

Nor does the Consular Letter, as petitioners would have it, disclose "much of the substance of the letter that is the subject of this FOIA case." Pet'r Mot. at 2. In fact, the opposite is true. The Consular Letter reveals the substance of one sentence in the two-page Extradition Letter. It confirms that the letter at issue "stressed the Home Secretary's concern that questions of local prejudice were examined most carefully during the pre-trial process." Consular Letter at 1. The Consular Letter, however, does not in any way reveal any of the remaining information in the Extradition Letter; namely, that the British government refused extradition of Hagan and Croft on the firearms charges because "there is no English equivalent to the US offence of interstate transportation of firearms,"[3] that many in Britain, including prominent members of both Houses of Parliament, were concerned about the fairness of a trial in Oregon "because of the age

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[2] Present counsel for respondent was engaged on June 23, 1999, to handle the case in this Court. Counsel did not learn of the existence of the Consular Letter until after this Court's grant of certiorari on September 10, 1999.

[3] Respondent pointed out to this Court in his opposition to certiorari that the British had refused to extradite Croft and Hagan on the firearms charge in the indictment due to a lack of dual criminality. Opp. Cert. at 26. Respondent further noted that this fact had been communicated to the district court in Oregon in government pleadings, *id.* at 27, and that if any information regarding "dual criminality" was in the letter at issue, there was no plausible argument for it being withheld. *Id.* & n.15. In their reply, petitioners told this Court that "a distinct surrender warrant" contained the "dual criminality" information, implying that the letter at issue in this case did not. Reply Br. at 9 & n.9. In any event, given that this information was conveyed to a federal district court, it is well nigh impossible to conceive of anything more "innocuous" or more easily segregable from other portions of the letter.

of the alleged offense [and] the nature of the evidence against them (obtained, so it appears, from plea bargains)," that the Home Secretary considered conditioning extradition on a change of venue but concluded that the place of trial is "for the US authorities to decide," and that the controversy in Britain surrounding the extradition would likely be debated in Parliament, "possibly resulting in votes condemning the Home Secretary's action." Extradition Letter at 1-2. As respondent made clear in his brief, the Consular Letter supports a limited argument for segregating and disclosing the reference in the Extradition Letter to British concerns about local prejudice. Resp. Br. at 48-49. The Consular Letter does nothing, however, to undermine the British desire for confidentiality or petitioners' "rationale" for classification as to any other portion of the letter. Petitioners have found in the lodging of the Consular Letter a convenient fig leaf to cover their withdrawal from an untenable legal position and to justify the declassification of a letter that quite obviously should never have been classified under the specific criteria of President Clinton's Executive Order. *See* Exec. Order No. 12,958, 3 C.F.R. § 333 (1996) ("Clinton Order").

As repeatedly pointed out in respondent's brief on the merits, neither respondent nor the Ninth Circuit questioned petitioners' representations regarding the position of the British Government. Resp. Br. at 13, 36-48. The Ninth Circuit ruled that, given the profound changes wrought by the new Clinton Order, breach of diplomatic confidentiality, standing alone, could not justify classification *as a matter of law*. Pet. App. 14a-18a. That is how petitioners themselves characterized the Ninth Circuit's ruling when seeking this Court's review. *See* Reply Br. at 5 ("[T]he only issue before the court of appeals was the *legal* question whether the harm that the declarations described – harm arising from the very act of breaching a

foreign government's legitimate expectation of confidentiality – constituted a form of harm to the national security cognizable under the Executive Order.") (emphasis in original). Respondent defended the judgment below on those same *legal grounds* in this Court; *i.e.*, FOIA requires true de novo review and under that standard the Clinton Order cannot be read to "specifically authorize" classification based solely on a breach of general canons of diplomatic confidentiality. Resp. Br. 15-48.

The Consular Letter simply does not dispose of these issues. It supports segregation and disclosure of a single reference in the Extradition Letter, but nothing more. Resp. Br. at 48-49. That petitioners have unilaterally reexamined their own desire to honor British claims of confidentiality, after briefing to this Court, cannot undermine or affect in any way the Ninth Circuit's *legal* judgment that the harms petitioners identified below are not "cognizable" under the Clinton Order. If anything, the record below *favored* petitioners – the case was litigated on the premise that the British requested complete confidentiality. Thus, petitioners' claim that the decision below was litigated " 'upon a record improperly made up,' " Pet'r Mot. at 14 (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936)), is specious. Petitioners' legal change of heart in this Court should be treated no differently than a decision not to seek review in the first place.

ARGUMENT

On November 23, 1999, petitioners declassified and disclosed the Extradition Letter, thereby rendering this case moot. Thus, petitioners are not entitled to the *Munsingwear* remedy under any interpretation of that doctrine or any precedent of this Court. Apparently recognizing this fact, petitioners now seek to hold *respondent* somehow responsible for the decision to declassify – a decision that is, by executive order, committed to a limited group of Executive Branch officials. Even if petitioners could

somehow demonstrate that respondent participated in the decision to declassify, respondent's participation would have to *exceed* that of petitioners for this Court to even consider vacating the judgment below. *Bonner Mall*, 513 U.S. at 26.

This Court should firmly reject petitioners' attempt to cast a unilateral decision of the Executive Branch to declassify and disclose the letter at issue in this case as the responsibility of either respondent or the British Government. It was the responsibility of petitioners, exercising their "paramount authority in the area of foreign relations," Pet'r Br. at 16, to accurately ascertain the position of the British Government in this matter and accurately convey that position to the federal courts. Respondent quite naturally assumed that the British Government was aware of an official communication of one of its consular officers and that the British had made petitioners similarly aware. Petitioners undertook no discovery from respondent in this case. Instead, senior officials in the State Department filed declarations under oath attesting to the absolute, unwavering British desire that the entirety of the letter at issue remain confidential. Petitioners' own failure to carefully examine the premises of their own classification decision – and their tardy reexamination of that decision – cannot entitle them to the extraordinary remedy of vacatur.

It was petitioners' unilateral act of declassification, not respondent's lodging of the Consular Letter, that rendered this controversy moot. Petitioners' position throughout this litigation has been that the British expectation of confidentiality arose at the time the letter was sent to the United States. *See* Shiels Declaration ¶ 13; Pet. App. 52a; Kennedy Declaration ¶ 9; Pet. App. 58a-59a. Moreover, petitioners have maintained that the content of the letter is irrelevant. *See* Kennedy Declaration ¶ 4; Pet. App. 56a. That the British chose to reveal to respondent a single reference in the Extradition Letter does not bear upon the British expectation of confidentiality as to the

rest of the letter – including the most provocative parts of the letter discussing possible Parliamentary action against the Home Secretary. Respondent's lodging of the Consular Letter simply cannot explain petitioners' wholesale abandonment of their legal position before this Court.[4]

Try as they may, petitioners cannot avoid the simple, legal certainty that the decision to declassify a document rests entirely within their control. In their opening brief, petitioners emphasized the Executive's exclusive role in foreign affairs and his "authority to withhold information about foreign affairs and diplomatic negotiations even from Congress." Pet'r Br. at 17. Petitioners now seem to claim that either respondent, through his lodging of the Consular Letter with this Court, or the British Government, through their response to State's inquiry, have somehow divested the Executive of his previously plenary authority over foreign affairs and national security. But it is petitioners themselves, through their interpretation of the Clinton Order, who have decided what weight, if any, to give the British position in their classification and declassification decisions. None of petitioners' implausible contentions can obscure the fact that in the

[4] Indeed, the United States litigates FOIA cases where some or all of the information at issue has been disclosed to the public from other sources. In these cases, the United States maintains that despite the disclosure from one source, acknowledgement by the United States that it received the information from a particular source at a particular time, would itself cause harm. *See, e.g., Fitzgibbon v. CIA*, 911 F.2d 755, 765-66 (D.C. Cir. 1990); *Afshar v. Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983). Petitioners obviously *made a conscious and voluntary choice* not to take this position as to the one sentence of the Extradition Letter disclosed by the Consular Letter. As to the rest of the Extradition Letter, petitioners' arguments for non-disclosure were unaffected by the release of one sentence in another document. *See Public Citizen v. Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993); *Afshar*, 702 F.2d at 1129, 1131-32.

end, an officer of the State Department, a party petitioner in this case, has declassified the letter at issue and thereby mooted his own case. Under the Clinton Order, neither respondent nor the British Government are "Declassification authorit[ies]," entitled to take such a step. Clinton Order § 3.1(c); Pet. App. 80a.

This Court's unanimous decision in *Bonner Mall* is controlling in this case and requires denial of petitioners' motion to vacate. In *Bonner Mall*, this Court granted certiorari to review a point of bankruptcy law that had divided the lower courts. The case became moot when the parties entered into a settlement that was approved by the bankruptcy court. Much like petitioners here, the petitioner in *Bonner Mall* asked this Court to vacate the decision below, relying upon dicta in *United States v. Munsingwear* to the effect that vacatur of the decision below is the "established practice" where a case becomes moot on appeal. *Bonner Mall*, 513 U.S. at 23 (citing *Munsingwear*, 340 U.S. at 39). The government filed an amicus brief in *Bonner Mall* supporting the petitioner's broad view of *Munsingwear*. *See* Brief for the United States as Amicus Curiae in No. 93-714 (filed May 12, 1994).

This Court refused to give an expansive reading to the *Munsingwear* dicta and instead undertook to reexamine the theoretical underpinnings of the practice of vacatur.[5] The Court found that one of the central considerations governing availability of the remedy is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Bonner Mall*, 513 U.S. at 24 (citations omitted). The Court drew a clear line between unilateral actions of the respondent and "happenstance" on the one hand, both of which are beyond a petitioner's control, and those cases where petitioner takes some voluntary action to moot his own case, on the

[5] Petitioners' motion for vacatur in this case relies upon the *Munsingwear* dicta as if *Bonner Mall* were never decided. *See* Pet'r Mot. at 12-13.

other. In *Bonner Mall* itself, even respondent's participation in the settlement did not alter the analysis:

> That the parties are jointly responsible for settling may in some sense put them on even footing, but petitioner's case needs more than that. Respondent won below. It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur. *Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.*

Id. at 26 (emphasis added). The Court also noted serious institutional concerns with a rule that would allow a petitioner to participate in mooting the case and then nonetheless erase the decision below. "To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system." *Id.* at 27.

Bonner Mall dictates denial of petitioners' motion to vacate the judgment below in this case. Unlike a settlement, petitioners' decision to declassify is by law a unilateral one – neither respondent nor the British Government have any right to participation in that decision. Petitioners' decision to declassify, even if influenced by respondent's lodging of the Consular Letter, is still, in the end, petitioners' decision. Like the decision to settle in *Bonner Mall*, petitioners' voluntary involvement in mooting the case precludes petitioners from carrying their burden of justifying extraordinary equitable relief. *Accord Karcher v. May*, 484 U.S. 72, 83 (1987) (denying vacatur because "[t]his controversy did not become moot

due to circumstances unattributable to any of the parties"). Moreover, the same institutional concerns identified by the Court in *Bonner Mall* are present here. If vacatur is granted, petitioners gain a "merits victory" by their own hand without a full hearing for respondent in this Court. Such a precedent could become a weapon to "reverse by mootness" any FOIA or Administrative Procedure Act precedents with which the government disagrees.

Petitioners' reliance upon this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), is sorely misplaced. In that case, Maria-Kelly F. Yniguez, an Arizona state employee, brought a First Amendment challenge to Article XXVIII of the Arizona Constitution, which she claimed operated to prohibit her from using any language other than English in her communication with the public as a state official. Yniguez sought injunctive relief prohibiting Arizona authorities from enforcing the provision against her. The Arizona Attorney General issued an opinion to the effect that the English-only provision applied only to "official acts of government," *id.* at 52 (citation omitted), and did not prohibit state employees, like Yniguez, from using other languages to provide effective service to the public. Despite this opinion, and despite the pendency of a similar case before the Arizona Supreme Court, both the district court and the court of appeals interpreted Article XXVIII to work a sweeping ban on the use of any foreign language by all state employees. *Id.* at 54, 61-62. Both courts refused to certify the question of the proper interpretation of the provision to the Arizona Supreme Court, as repeatedly requested by the Arizona Attorney General. *Id.* at 76-77.

The day after notices of appeal were filed, and the day before the appeal was formally docketed, Yniguez voluntarily resigned her position as a state employee to undertake a position in the private sector. *Id.* at 59-60, 68 n.23. Despite the obvious implications of Yniguez's resignation to the presence of a live case or controversy,

Yniguez's counsel failed to bring her resignation to the attention of the court of appeals. *Id.* at 68-69 & n.23. Eventually, the Arizona Attorney General brought the resignation to the court of appeals' attention in a suggestion of mootness. *Id.* The court of appeals found a live controversy by construing Yniguez's complaint as seeking nominal damages as well as prospective relief.

Under these circumstances, the Supreme Court found that the extraordinary remedy of vacatur of the lower courts' merits determinations was appropriate. Three considerations were paramount. First, Yniguez, respondent in this Court, had unilaterally taken a voluntary action that mooted the controversy. "Yniguez's changed circumstances – her resignation from public sector employment to pursue work in the private sector – mooted the case stated in her complaint." *Id.* at 72 (citing *Boyle v. Landry*, 401 U.S. 77, 78 (1971)). Second, because that resignation occurred prior to disposition of the appeal, there was no live controversy before the court of appeals, which should have dismissed the appeal upon learning of Yniguez's resignation. *Id.* at 73. Finally, this Court was troubled by the failure of the lower courts to make use of the procedural device of certification to the Arizona Supreme Court. Certification of a novel state law question in these circumstances was consonant both with federalism concerns and a federal court's duty to avoid constitutional adjudication if possible. *Id.* at 76-81. Because a definitive interpretation of Article XXVIII of the Arizona Constitution from the Arizona Supreme Court might have eliminated the need to address the federal constitutional question, the lower courts erred in not pursuing this procedural route prior to reaching the First Amendment issue. *Id.*

None of the three factors central to the Court's decision to vacate in *Arizonans for English* is present here. First, respondent did not, indeed could not, moot his own complaint. Petitioners cannot plausibly maintain that respondent's lodging of the Consular Letter, like

Yniguez's resignation, itself mooted this case. If that were true, petitioners should have moved to dismiss the case as moot *without declassifying the Extradition Letter and providing it to him*. The Consular Letter revealed only a small portion of the Extradition Letter and revealed it through a source other than petitioners. Respondent's complaint sought disclosure of the full Extradition Letter by agencies of the United States pursuant to the FOIA. Only the United States could moot respondent's complaint by voluntarily taking the very action the complaint sought to compel.

Second, unlike *Arizonans for English*, this case was not moot prior to its adjudication in the court of appeals. The case became moot on November 23, 1999, when petitioners declassified the Extradition Letter and provided it to respondent. Thus, unlike *Arizonans for English*, there is no "defect" in the lower court's jurisdiction to "notice." *Id.* at 73 (citing *United States v. Corrick*, 298 U.S. 435, 440 (1936)) (further citations omitted).

Third, there is no procedural defect in the proceedings below, like the failure to certify in *Arizonans for English*, that would justify the extraordinary remedy of vacatur. Nor did the Ninth Circuit purport to pass on any momentous issues of constitutional import. It simply held that President Clinton's new executive order, consciously adopted to increase disclosure and avoid presumptive classification, did not "specifically authorize" the classification of this one letter. The government's disclosure of the letter serves to confirm this judgment. It is wholly innocuous, has clearly segregable portions, and plainly should not have been classified in the first place. The rapid British abandonment of confidentiality concerns about the *whole* letter, based on the prior disclosure of the letter's single reference to local prejudice, certainly undermines petitioners' apocalyptic representations of

diplomatic harm from disclosure made to both the courts below and this Court.[6]

Finally, this Court should definitively reject the government's extraordinary suggestion that, despite the absence of a live controversy, this Court should "peek" at the merits, adopt petitioners' legal analysis, and vacate the judgment below on those grounds. *See* Pet'r Mot. at 18-24. Neither *Arizonans for English* nor any other case of this Court endorses such an unconstitutional and unfair procedure. As this Court emphasized in *Bonner Mall*, "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review." *Bonner Mall*, 513 U.S. at 21 (citations omitted). Ancillary jurisdiction exists pursuant to 28 U.S.C. § 2106 to issue such orders as necessary to dispose of the case as justice may require, without reference to the merits of the action. "If a judgment has become moot, this Court *may not consider its merits*, but may make such disposition of the whole case as justice may require." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944) (emphasis added).

Arizonans for English is not to the contrary. While finding fault with the *procedural* handling of the case by

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[6] Nor can the British change of heart provide petitioners with a rationale for mootness independent of their own actions. Only the United States government's action in declassifying and disclosing the letter could moot respondent's FOIA complaint. Petitioners simply cannot maintain the claim that the declassification of this letter is some event external to their own control. *Compare United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466 (1916) (outbreak of World War I rendered anti-trust action against British and German shipping lines moot, vacatur granted). In any event, while petitioners have filed the British letter assenting to disclosure with the Court, they have not recounted their own written and oral communications to the British prior to receiving that letter.

the lower courts, this Court was careful to "express no view on the correct interpretation of Article XXVIII or on that measure's constitutionality." 520 U.S. at 49. Because it found the case moot, the Court emphasized that it would address only questions going "to the Article III jurisdiction of this Court and the courts below, *not to the merits of the case.*" *Id.* at 67 (citing *Bonner Mall*, 513 U.S. at 20-22) (emphasis added). Petitioners' suggested "peek at the merits" in a moot case violates Article III, is patently unfair, and is definitively prohibited by the decisions of this Court.

In sum, there was a live controversy before the district court and the court of appeals. The court of appeals resolved that controversy in respondent's favor based on the legal conclusion that the Clinton Order did not contemplate classification in these circumstances. Petitioners have now mooted the case by taking an administrative action committed to them alone by law. Vacating the judgment below in these circumstances is contrary to an orderly system of justice and would allow petitioners to reverse the lower court judgment by their own hand. This Court's precedents firmly reject such a result.

CONCLUSION

Petitioners' motion to vacate the judgment below should be denied. The writ of certiorari should be dismissed as moot.

Respectfully submitted,

CHARLES J. COOPER*
ANDREW G. MCBRIDE
COOPER, CARVIN & ROSENTHAL, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600

December 1, 1999

*Counsel of Record